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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-927

BANKERS LIFE & CASUALTY COMPANY,

Petitioner,

vs.

THE VILLAGE OF NORTH PALM BEACH FLORIDA, ETC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE VILLAGE OF NORTH PALM BEACH, FLORIDA IN OPPOSITION

HERBERT L. GILDAN
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West Palm Beach, Fla. 33402

IN THE

Supreme Court of the United States

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STATEMENT OF THE CASE

Respondent, The Village of North Palm Beach, Florida, deems it necessary to correct certain inaccuracies in the Statement of the Case filed by Petitioner.

All the evidence and exhibits offered in the entire case before the Courts was based on a Stipulation for an Agreed Case (A-1), together with the testimony of one live witness limited to explaining why he wrote a certain letter (A-11).

Despite the stipulation, Bankers set forth on Page 6 of its brief, a completely inaccurate paragraph entitled "The Negotiations". Bankers and the Village did not have "long negotiations." Bankers first tried to get local permission to dredge and fill in December, 1968, five years after its Corps of Engineers permit ended and negotiations between Bankers and the Village ended in July, 1969. (A-8) The Village never adopted an ordinance to give Bankers a local fill permit and also, of course, never attempted to revoke the ordinance. At no point was the controversy resolved. Bankers never received a local fill permit from the Village. (A-8).

Bankers sought in 1969 to dredge and fill submerged land within the jurisdiction of the Village, State and Federal governments without required statutory permits from any of the governments involved and without current ecological studies being made by the Federal government.

Bankers basically argues that an expired permit to dredge and fill from the Corps of Engineers (which lapsed by its very terms in 1963) was turned into a perpetual permit to dredge and fill, impervious to any Congressional or State Statutes passed prior thereto or thereafter, and this expired permit transferred title to real property owned by the State to Bankers. The argument was no basis in law or in logic. The true issue in this case was decided contrary to Bankers in *Zabel v. Tabb*, 430 F .2d 199 (1970).

ARGUMENT

Petitioner has set forth no basis for the issuance of a Writ of Certiorari as the opinion of the Court of Appeals in the case at bar demonstrates.

Looking to the issues as framed by Petitioner in its Brief, they can be briefly answered as follows:

I.

ECOLOGICAL FACTORS WERE WEIGHED BY THE ENGINEERS BEFORE GRANTING BANKERS' REQUEST FOR AN EXTENSION OF THE PERMIT IN 1960, SO THAT ISSUE WAS PASSED UPON BY THE APPROPRIATE FEDERAL AUTHORITY.

There is no evidence to support this statement except an unsupported conclusion by an employee of the Corps of Engineers quoted by Bankers on Page 9 of its brief as follows:

Answer by Mr. McKnight: "The Fish and Wildlife Coordination Act which gave us this authority [to consider ecological consequences] was passed in 1958, sir, and we did not have that on the books in 1957.

Q. But I take it, in 1960, when you renewed this permit?

A. Right.

Q. You, in your official capacity, which you have held lo this many years, determined that they were not adverse ecological consequences of this permit?

A. Well, I can say this, that we must have determined that there were no overriding damages to the fish and wildlife resources, or we wouldn't have extended it in 1960." (App. 29)

Answer by Mr. McKnight: " . . . We sent notices, the public notices which were issued, to the state and federal agencies for their comments." (App. 27).

The last paragraph of the above quote is taken out of context, however, and gives the false impression that it refers to the 1960 permit renewal. Actually it referred to the 1963 application for

renewal which was specifically denied by the Corps. (A-18)

Even *if* Banker's statement above was properly presented, its argument might have had validity in 1963, but can have no effect in 1969 when substantial ecological changes could have occurred and numerous laws were passed to protect the environment.

II

THE ENGINEERS COULD NOT ALLOW THE LOCAL AUTHORITIES (STATE AND VILLAGE) TO USURP THE FEDERAL DISCRETION AS TO WHETHER BANKERS SHOULD OR SHOULD NOT GET A PERMIT.

There is no evidence in the record to show that either the State or local governments usurped any Federal discretion.[1] The Corps exercised its discretion in 1963 and refused to grant or renew a dredge and fill permit to Bankers. No appeal of that decision was made until 1969. Neither the State nor the Village disagrees with the Corps' decision.

There is no conflict of jurisdiction and no conflict of action between the three governmental Respondents over dredge and fill rights surrounding Petitioner's property. Contrariwise, in *Zabel v. Tabb*, Suprea the State and local governments granted dredge and fill permits and the Federal government refused to grant such permission. The Court of Appeals upheld the Corps of Engineers and the Supreme Court denied Certiorari. In the case at bar the State and local governments did *not* grant any dredge and fill permits and the Corps' permit has long since

[1]The statement by the State of Florida in its Brief under Statement of this Case that the Village objected to renewal of Bankers permit in 1963 is in error. The Village had nothing to do with this matter in any way until December 1968. (A-8).

expired. All three governments agree that no permit to dredge and fill should issue without Banker's compliance with applicable law and none of the governments involved dispute the power of the Federal government over filling in submerged land which is riparian to navigable waters.

Again, even if we assume, arguendo, that the Corps erred in 1963, the laws and conditions prevalent in 1969 cannot be disregarded. See *Zabel v. Tabb*, Supra.

III

THIS CASE PRESENTS PROBLEMS OF WAIVER AND ESTOPPEL.

This point is incorrect and is based on an improper statement of the facts stipulated to by all parties. Bankers sets forth the factual basis for this point on Page 15 of its brief as follows: "The facts already in the record show an estoppel is justified here. After the Corp of Engineers said it would be 'pleased to grant the extension promptly upon the withdrawal of the derrel request . . .' and that the delay 'will have no effect' (App. 10, fn. 1), what happened is described thusly by the Court of Appeals:

'For several years no further action was taken as between Bankers and The Corps of Engineers. During this time various attempted settlements of disputes were negotiated between Bankers, the State of Florida, and the Village of North Palm Beach, concerning the title of the submerged land sought to be filled.'

"The Village did give the permit in 1969, but immediately sought to revoke it, so this suit was filed. Any delay was occasioned solely by Bankers trying to resolve the questions which the Corps of Engineers had said Bankers should try to resolve, and such a delay was not supposed to hurt Bankers."

As refuted under the Statement of the Case, no permit was ever granted and none revoked. (A-8) Furthermore, the record is based on a stipulation that the first contact between Petitioner and the Village was in December of 1968, and the negotiations between Bankers and the Village took place after December, 1968. (A-8) The delay between December, 1963 and December, 1968 was not occasioned in any way by Bankers trying to resolve the question which the Corps of Engineers had said Bankers should try to resolve, and certainly not by the Village. The entire five-year delay was occasioned solely by Bankers failure to take any action at all vis-a-vis the Village.

The remaining argument of Petitioner is logically and amply refuted by the Court of Appeals in its opinion. Bankers seeks to convince this Court that a letter from an employee of the Corps of Engineers in 1963 refusing to extend a permit which expired by its very terms, estops the Corps of Engineers in 1969 from refusing to issue a new permit without following Congressional mandates not to issue such permits without considering environmental factors in 1969. The references to no new laws and rulings of the Federal government is not correct.[2] The possibility of ecological changes in the location of the proposed fill during the ten-year interval since the last extension of the dredge and fill permit seems to compel an examination of the possible effect on dredging and filling the area in question in 1969 and thereafter as is specifically required by law.

[2]See briefs of the State and Federal Government filed with this Court which the Village agrees with entirely except as set forth in footnote 1 to this brief.

Furthermore, the Corps of Engineers is no longer a proper party to this suit until the question of title to the submerged land is decided in State Court (which Bankers says it will do). If Bankers has no title to the proposed fill area, all issues before the Courts are moot. Even if Bankers could acquire title to the submerged land it seeks to fill, then State Statutes which affect the State and local governments must be complied with by Bankers before the Corps of Engineers should process Bankers' application for a dredge and fill permit. (A-21) There is therefore no reason to require the Corps of Engineers to remain a party litigant, and no issue remains in this suit between Bankers and the Corps.

CONCLUSION

Respondent, The Village of North Palm Beach, respectfully submits that Petitioner has set forth neither facts nor law nor valid reasons for the issuance of a writ of Certiorari and the petition should be denied.

Respectfully submitted,

Herbert L. Gildan
Attorney for Respondent
Village of North Palm Beach

APPENDIX.

UNITED STATES DISTRICT COURT
For The
Southern District of Florida
Miami Division

BANKERS LIFE & CASUALTY COMPANY, an Illinois corporation, authorized to transact business in the State of Florida,

Plaintiff,

vs.

THE VILLAGE OF NORTH PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, etc., et al,

Defendants.

Civil Action
Case No. 69-1053
Civ-Choate

STIPULATION FOR AN AGREED CASE

INTRODUCTION

In accordance with the court's suggestion made in open court on March 15, 1971, the lawyers for the parties make and file this, their stipulation for an agreed case.

NATURE OF THE ACTION OR PROCEEDING

The plaintiff brings a one-count amended complaint.

Under the heading, *Pleadings*, the parties will stipulate for the dismissal with prejudice of the second count of the plaintiff's amended complaint. By its amended complaint, the plaintiff seeks declaratory relief, injunction and supplemental relief as to its ownership of submerged lands described in the amended complaint; as to it not being required to obtain permits from the defendant municipality and its officers, the defendant, *Board of Trustees of the Internal Improvement Trust Fund*, and the defendants, *District Engineer* and the *United States of America*, to bulkhead and fill its submerged lands, or in the alternative, as to the requirement upon these several defendants to issue the requisite permits.

The defendant municipality has made a counterclaim. Under the heading, *Pleadings*, the parties will stipulate for the dismissal with prejudice of the defendant municipality's counterclaim.

THE BASIS OF FEDERAL JURISDICTION

The court has jurisdiction of this cause under the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 10 of the Rivers and Harbours Act, 1899, 30 *Stat.* 1151, 33 U.S.C., Sec. 403, and because of diversity of citizenship and because the amount in controversy, exclusive of interest and costs, is in excess of $10,000.00.

THE PLEADINGS RAISING THE ISSUES

1. The parties stipulate that Count II of the plaintiff's amended complaint ought to be dismissed finally and with prejudice, all parties to stand and abide their own respective costs as to that count of the amended complaint.

2. The parties stipulate that the defendant municipality's counterclaim ought to be dismissed finally and with prejudice, all parties to stand and abide their own respective costs as to that counterclaim, except that the court ought to enter its order directing the clerk to pay over forthwith to the defendant municipality the sum of $49,530.60, paid into the registry of the court, as payment under protest of the 1969 and 1970 municipal ad valorem real property taxes assessed against the plaintiff's real property, such sum to be paid over to the defendant municipality and to be received by it in full and final satisfaction of municipal taxes for those years without payment of interest or penalties.

3. The parties stipulate that the defendant municipality's amended second, third, fourth, fifth and sixth affirmative defenses should all be stricken with prejudice.

4. The cause is at issue upon:

(a) Plaintiff's amended complaint, served March 17, 1970, Docket Entry No. 15, as amended by the court's order entered June 15, 1970, and as further amended as mentioned above.

(b) The answer of the *Trustees of the Internal Improvement Trust Fund,* served May 6, 1970, Docket Entry No. 35.

(c) Amended answer and first affirmative defense of defendant, *Village of North Palm Beach,* and its officers, served May 21, 1970, Docket Entry No. 39, as further amended above.

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(d) Answer of defendant, *Village of North Palm Beach,* and its officers, to plaintiff's amendment to amended complaint, served June 24, 1970, Docket Entry No. 50.

(e) Answer and affirmative defenses of defendants, *Avery S. Fullerton, Stanley R. Resor,* and the *United States of America,* served August 18, 1970, Docket Entry No. 57.

LIST OF ALL UNDISPOSED OF MOTIONS OR MATTERS REQUIRING ACTION BY THE COURT

There are pending undisposed of the motion for summary judgment of the defendant, *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,* served December 31, 1970, and the plaintiff's cross motion for summary judgment served January 26, 1971.

The parties stipulate that there may be offered in evidence at the trial the following elaborated exhibits which do not appear on the pretrial catalog:

Four 4" x 7" color photographs of part of the plaintiff's real property.

Village and county bulkhead ordinances.

Bulkhead map

Aerial photographs of the property taken in the years, 1953 and 1957.

Colored map of Trustees of the Internal Improvement Fund, Bulkhead Lines and Conveyances in Palm Beach County.

Tax assessor's assessment maps of Sections 10 and 15.

CONCISE STATEMENT OF STIPULATED FACTS WHICH REQUIRE NO PROOF AT THE TRIAL, WITH RESERVATIONS, IF ANY

1. Plaintiff is an Illinois corporation. Defendant Village is a municipal corporation organized and existing under the laws of the State of Florida located in Palm Beach County, Florida. Reuben Askew, Richard Stone, Robert Shevin, Thomas O' Malley, Fred O. Dickinson, Floyd T. Christian and Doyle Connor are members of the *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida. Avery S. Fullerton* is the District Engineers of the Corps of Engineers, Department of the Army, Jacksonville, Florida, District. *Stanley R. Resor* is the Secretary of the Army.

2. Plaintiff is now and has been ever since June 21, 1955, the riparian owner in fee simple of the upland real property located wholly within the municipal limits of the defendant Village in Palm Beach County, Florida, colored green, red, yellow and blue, on the map styled, Trustees of the Internal Improvement Fund, Engineering Division, Bulkhead Lines and Conveyances in Palm Beach County, No. 50-B-3, which map is to be received in evidence at the trial without objection. Plaintiff is the owner by deed of the submerged lands colored orange on the map. Under the United States Corps of Engineers permit hereinafter mentioned, plaintiff has filled that portion of the property cross-hatched in blue on the map and part of the isthmus between Munyon Island and the upland. Plaintiff does not have a deed to the area cross-hatched in blue on the map. The filling took place after June of 1957 and was completed prior to December 31, 1963.

3. Much of the upland real property is low in elevation, wild, unimproved, uncleared and covered with cabbage palms and Australian pines. The condition of the upland real property appears from the several photographs to be offered in evidence without objection at the trial, and the size, dimension and location of the upland real property appears from the map

colored upon, mentioned previously.

4. Much of the submerged lands which surround the upland real property are quite shallow and will support only light draft local boating. Much of the submerged land surrounding the real property is exposed at low tide.

5. On or about April 17, 1957, the plaintiff purchased from the *Trustees of the Internal Improvement Fund*, predecessor to the *Board of Trustees of the Internal Improvement Trust Fund*, 2,500,000 cubic yards of fill material in the bed of Lake Worth adjacent to the real property, at a cost of $26,600.00, which was paid. 1,116,170 cubic yards of that fill material was consumed in the filling of lands then owned by the plaintiff on the west side of Lake Worth, which lands are not part of the subject matter of this action and which lands were filled under a permit from the United States Corps of Engineers different from the permit hereinafter described. Approximately 250,000 to 260,000 cubic yards of that fill material was consumed in filling Munyon Island or Island No. 1, the part filled being shown as the blue-hatched area on the map, and in filling an isthmus shown on the map between Munyon Island and the mainland. There remains 1,117,830 cubic yards of the fill material purchased by the plaintiff which has not been consumed.

6. On or about February 15, 1957, the plaintiff made application to the District Engineer, Corps of Engineers, for a permit to fill the real property. A copy of that application, together with the dredging, bulkhead and fill maps mentioned in the application, is Composite Exhibit 1 to the complaint. The bulkhead lines shown on these maps correspond to the bulkhead lines as established from time to time and as now established by the Village and as shown on a map entitled, *Sketch Showing Bulkhead Lines Established by Ordinances of the Village of North Palm Beach, Florida*, and as shown on the colored map hereinabove referred to as the map.

7. On or about March 19, 1957, Palm Beach County, Florida, advised the Corps by letter, a copy of which is attached

as Exhibit 2 to the complaint, that the plaintiff's application to bulkhead, dredge and fill its real property complied with the bulkhead line mutually agreed upon by Palm Beach County and the plaintiff, so that the county had no objection to the issuance of a permit to bulkhead and fill the real property. The bulkhead lines approved by Palm Beach County correspond to the bulkhead lines established by the Village on May 27, 1957, and as now established. The *Trustees of the Internal Improvement Trust Fund* approved said bulkhead lines, which approval continues in full force and effect.

8. On or about April 17, 1957, plaintiff informed the *Trustees of the Internal Improvement Trust Fund* by letter that it had made request of the United States Corps of Engineers to bulkhead and fill the real property and submerged lands adjacent to it. In that letter plaintiff sent the Trustees its check for $26,600.00 in payment for the purchase of 2,500,000 cubic yards of fill material to be dredged from the bed of Lake Worth. A copy of that letter is attached to the complaint as Exhibit 3. The Trustees collected the proceeds of the plaintiff's check and have retained the proceeds ever since. (Now, as of the date this stipulation is dictated, the Trustees offer to return a prorata portion of the sum so paid but plaintiff refuses to accept the return of that sum and contends that it is entitled to its remedy as pled in the amended complaint).

9. Plaintiff filled the real property and the submerged lands surrounding the real property under the permit in the years, 1957 and 1958. (Plaintiff contends, and the other parties do not dispute, that plaintiff also filled the real property and the submerged lands surrounding the real property in the year, 1961). The location of this fill on the submerged lands is shown on the cross-hatched blue on the map and is also located in the isthmus between Munyon Island and the mainland shown on the map.

10. In December 1960, the Corps extended plaintiff's dredge and fill permit to December 31, 1963. Prior to December 31, 1963, plaintiff applied to the Corps for a second extension

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of its dredge and fill permit. On or about December 16, 1963, the Trustees wrote the Corps a letter and requested that final consideration of the plaintiff's request for an extension of its permit by the Corps be deferred pending receipt of a local fill permit, which local permit the Trustees contended ought to be granted or denied by the Village under F.S. Sec. 253.124.

11. On or about December 27, 1963, the Corps wrote the plaintiff a letter, a copy of which is attached to the complaint as Exhibit 5, upon which letter plaintiff principally bases its claim in the alternative that (1) it needs no further permit from the Corps or that (2) the Corps ought to issue it a permit as a matter of strict right.

12. On December 6, 1968, the plaintiff sent the Village a letter, which is defendant Village's Pretrial Exhibit No. 10, and on March 17, 1969, plaintiff sent the Village a second letter, which is defendant Village's Pretrial Exhibit No. 14, which letters plaintiff contends are its applications for a local fill permit and which applications plaintiff contends it made without waiving any of its right, but the Village contends that the letters are not applications for a fill permit.

13. The Village received a letter dated May 28, 1969, from the Florida Board of Conservation referable to the permit, which letter is defendant Village's Pretrial Exhibit No. 16. On June 12, 1969 (all of which more fully appears from minutes of a meeting of the Village Council held that date, defendant Village's Pretrial Exhibit No. 17), the Village Council passed a motion that the permit be granted. On June 24, 1969, the Village wrote plaintiff a letter advising plaintiff of the Village's action at the June 12, 1969, council meeting. The letter is defendant Village's Pretrial Exhibit No. 8.

14. On July 10, 1969, without giving the plaintiff any notice and without affording the plaintiff's representative, who was present at the Village Council meeting, an opportunity to be heard, the Village rescinded its previous action in granting the permit. The plaintiff contends that the purported rescission of the permit was not accomplished in accordance with the

Village's Ordinance No. 31 and was contracty to law. The Village contends that no permit was issued in the first instance. Minutes of the Village Council meeting of July 10, 1969, are defendant Village's Pretrial Exhibit No. 819, and defendant Village's Ordinance No. 31 is defendant Village's Pretrial Exhibit No. 42.

15. The plaintiff's chief executive officer, Mr. John D. MacArthur, caused a letter dated July 9, 1969, to be published in response to a circular over the signature of John D. Bacon, M.D., Chairman, which is defendant Village's Composite Pretrial Exhibit No. 28. The plaintiff contends that the letter and the circular are both irrelevant and immaterial.

16. On July 10, 1969 (by letter which is plaintiff's Pretrial Exhibit 16), plaintiff informed the Corps that it had received a local permit from the Village. On July 18, 1969 (by letter, which is plaintiff's Pretrial Exhibit No. 18), the Corps informed the plaintiff that it was necessary to obtain the approval of the Trustees before action could be taken on plaintiff's application for a permit from the Corps.

17. On October 21, 1969, plaintiff made application to the Trustees to approve the application for extension of the Corps' Permit No. *SAKSP* 800.61 (57-103). On March 12, 1970, the Trustees informed the plaintiff by letter, which is plaintiff's Pretrial Exhibit No. 20, that the Trustees would issue plaintiff no permit until plaintiff obtained a permit from "the local authority" (meaning the defendant Village).

18. All of the actions of the several defendants were done by them under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Florida, County of Palm Beach, *The Village of North Palm Beach, Florida,* and the laws of the United States of America, and all such actions were done by them in their official capacities.

19. Plaintiff contends, and the defendants would offer no evidence to the contrary, for purposes of this lawsuit only, that the approximate acreage contained in the upland shown on the colored map, including Munyon Island, is 288 acres, and

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that the approximate acreage of the submerged lands which plaintiff seeks to fill out to the bulkhead line is 194 acres. Plaintiff contends, and the defendants would offer no evidence to the contrary at the trial, for purposes of this lawsuit only, that the fair market value of the submerged lands if filled out to the bulkhead line, is $21,250,000.00. Around one-third of the upland is so shallow in width that the same is not subject to being put to use for building unless filled out to the bulkhead line to some extent. The defendants contend that all of the foregoing facts are irrelevant, except in so far as they may intend to prove that the amount in controversy is in excess of $10,000.00, and the defendants stipulate that the amount in controversy is in excess of $10,000.00.

20. The plaintiff has paid ad valorem taxes on the submerged lands shown on the map, colored orange. The plaintiff has paid no ad valorem taxes on the other submerged lands in controversy in this action except that the plaintiff has paid ad valorem taxes on the uplands and the riparian rights appurtenant thereto.

21. For the purposes of this lawsuit, the parties agree that neither the defendant municipality nor Palm Beach County assessed or collected taxes in the area cross-hatched blue on the map.

22. The defendants intended that the plaintiff relied on the several representations and official acts of the defendants mentioned above, and the plaintiff did rely upon them.

DATED this 17th day of March, 1971, at Palm Beach, Florida.

Law Offices of Ronald Sales
Attorneys for Plaintiff
249 Royal Palm Way
Palm Beach, Florida

By /s/ Ronald Sales

Nason, Gildan & Yeager, P.A.
Attorneys for Defendants,
Village of North Palm Beach,
Village Mayor, Councilmen,
Village Manager, Village Tax
Collector and Village Tax
Assessor
2250 Palm Beach Lakes Boulevard,
Palm Beach, Florida

By /s/ Herbert L. Gildan
except as to paragraph 22

J. Kenneth Ballinger,
Associate Counsel,
Board of Trustees of the Internal Improvement Trust Fund,
State of Florida, Elliot Building, Tallahassee, Florida

By /s/ Herbert D. Sikes
except as to paragraph 22

Honorable Robert Rust,
United States Attorney, P. O. Box 1070, Miami, Florida, Attorney for Stanley R. Resor, Avery S. Fullerton and the United States of America

By /s/ Robert Silverstein
protest all except paragraph 11

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BANKERS LIFE & CASUALTY COMPANY, an Illinois corporation, authorized to transact business in the State of Florida,

Plaintiff,

vs.

THE VILLAGE OF NORTH PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, etc., et al,

Defendants.

No. 69-1053-Civ-EC
EXCERPT
TRANSCRIPT

TESTIMONY OF ARTHUR L. McKNIGHT

The above-entitled matter came on for hearing in a Non-Jury Trial before the Honorable Emett C. Choate, Federal Court Judge, in Room 201, United States Post Office Building, 400 South Olive Street, West Palm Beach, Florida, on Wednesday, March 17, 1971, commencing at 10:00 o'clock a.m.

APPEARANCES:

Ronald Sales, Esq.,
on behalf of the Plaintiff

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The Court: Gentlemen, we will have a recess in the Bankers Life case while I handle another matter.

(Thereupon a short recess was taken after which the following proceedings were had.)

Mr. Silverstein: Your Honor, the Government will call a witness to explain the letter, Pre-trial Exhibit No. 9.

Mr. Sales: Your Honor, before this witness is sworn, the Plaintiff will object to the Government calling him as a witness because the Government listed no witnesses on their pre-trial stipulations.

Mr. Silverstein: I said with your permission that I would call him. Without your permission, of course, I cannot do that. It is not necessary anyway.

Mr. Sales: I don't permit – I mean, I don't agree.

The Court: I will overrule your objection, Mr. Sales.

Mr. Sales: Thank you, Your Honor.

The Court: This is merely an explanatory witness, Mr. Silverstein.

Mr. Silverstein: Yes, Your Honor, merely explanatory. It is merely to explain why he wrote the letter.

Mr. Sales: Are you attempting to explain away the estoppel of this letter?

Mr. Silverstein: Will you please state your name, your assignment, and your location of the assignment for the Court.

The Witness: My name is Arthur L. McKnight. I live in Jacksonville, Florida. I am an employee – registered professional engineer, employed at the Corps of Engineers.

Mr. Sikes: Excuse me, sir, but the witness hasn't been sworn.

Thereupon:

Arthur L. McKnight, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Silverstein:

Q. Will you please state your name, your assignment, and the location of your assignment for the Court.

A. My name is Arthur L. McKnight, and I live in Jacksonville, Florida. I am an employee and a registered professional engineer, employed at the Corps of Engineers. I am Chief of the Operations Division of the Jacksonville District of the Corps of Engineers.

Q. How long have you been with the Corps of Engineers?

A. Almost thirty-six years.

Q. And your present assignment, how long have you been Chief of Operations for the Corps of Engineers in Jacksonville?

A. A little over twenty years.

Q. Mr. McKnight, I invite your attention to Plaintiff's Exhibit No. 9, a letter dated January 27, 1963, which is paragraph 11 of the said stipulation.

The Court: Show him the letter.

By Mr. Silverstein:

Q. Are you familiar with that letter?

A. Yes, sire.

Q. Are you the gentleman who wrote that letter?

A. Yes, sir.

Q. I ask you if that letter – the Plaintiff contends that – they base their claim on that they need no further permit. Would you explain the substance of that letter.

Mr. Sales: I object, Your Honor. The letter speaks for itself. It is the best evidence of what the letter says.

The Court: I sustain the objection. Mr. Silverstein, ask him the question, what do you mean by the letter where you say so and so?

The Witness: Yes, Your Honor.

By Mr. Silverstein:

Q. I invite your attention to – (pause).

Mr. Sales: It is the last sentence.

By Mr. Silverstein:

Q. The last sentence of the second paragraph: "The lapse in the permit will have no effect insofar as the Corps of Engineers is concerned." Will you explain that to the Court.

Mr. Sales: Before you answer that, sir, please.

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I am a little hard put to object to a question that the Court framed for the witness, but I do object, Your Honor, because I do think that the letter itself speaks for itself and it is in plain English language.

Mr. Silverstein: The Government has no objection to the witness not explaining the letter. We will make our argument on the letter in Memorandum of Law.

Mr. Sales: I think it is an argument. I think the letter says what it says.

Mr. Silverstein: That is purely your opinion.

Mr. Sales: The question is whether a reasonable businessman, Mr. MacArthur read the letter with the leave that it means what it says.

Mr. Silverstein: Your Honor, I take exception. It is the Court that decides this.

The Court: I think we need an explanation.

Mr. Silverstein: Go ahead and answer the question.

The Court: Go ahead and answer.

What we want to hear from you is what did you mean.

The Witness: Well, I think I can say –

The Court: Take your time. We normally don't accept conclusions, but we are interested in them.

By Mr. Silverstein:

Q. Go ahead and answer the question.

A. The applicants had expressed concern because this letter was written on the 23rd of December, 1963, and their permit was going to expire in four days. They had expressed concern that the expiration of the permit might have some adverse effect on our continuing to process their application.

The reason that I put this sentence in there (indicating) was just to point out that if the permit lapsed this had no effect whatsoever on our processing procedures and would not have any adverse effect on them.

Mr. Silverstein: This is, in substance, the Government's position, Your Honor.

We will not take any more time of this Court.

Mr. Sales: May I inquire, Your Honor?

The Court: Yes, sir.

CROSS EXAMINATION

By Mr. Sales:

Q. That is what you say in the letter. However, is it?

A. I explained as to what the sentence says, that the lapse would have no effect.

Q. You mean, insofar as the Corps of Engineers.

It says:

"The lapse in the permit will have no effect insofar as the Corps of Engineers is concerned."

That is what is says, doesn't it?

A. I stated a moment ago what my intentions were to mean by that sentence.

Q. The letter makes reference to a telephone conversation which you or one of your colleagues had been having with Mr. Horace Miller, is that right?

A. Yes, sir.

Q. What did you tell him about not worrying about the permit expiring?

A. I didn't participate in the conversation, so I can't testify about what was said.

The Court: What was reported to you by the colleague?

The Witness: Colonel Parfitt, my colleague, to the best of my recollection, told me of this phone call and that Mr. Miller, I believe that is his name, was quite concerned that if the permit was allowed to expire by the time limitation, which it would on the 31st of December, that this would be to the disadvantage of the applicant.

My intent was to assure them that that was not the case.

Mr. Silverstein: Could you –

By Mr. Sales:

Q. Do you mean, sir –

Mr. Silverstein: I am sorry, sir.

The Court: You got him started, sir, so give him time.

Mr. Silverstein: I am sorry, Your Honor.

By Mr. Sales:

Q. Had any objections to the extension of the permit been received from the standpoint of navigations?

A. From the standpoint of navigation?

Q. Yes, sir.

A. I believe not, sir.

Q. And that was the only consideration that the Corps had, was it not, in 1963, navigation?

A. No, sir.

Q. Were the birds and bees consideration in 1963?

A. Yes, sir.

Q. In your experiences prior to the case known as Zabel versus Tabt, had the Corps considered the ecological considerations?

A. Oh, yes, sir, in many cases.

Q. Had the Corps also considered ecological considerations referable to the Bankers' permit?

A. They certainly would have been considered. They were not filed for consideration at the time we issued our notice in 1963.

Q. I take it that there was no adverse ecological sequela to this permit or it wouldn't have been issued in the first place.

A. Well, no, sir. It was not issued.

Q. Was it issued and then extended for three years?

A. Yes, sir.

Q. We are talking about the same permit, aren't we?

A. Yes, sir.

Q. The permit I am talking about was issued in 1957 for three years and extended for three years –

The Court: I think we might get an answer –

The Witness: The Fish and Wildlife Coordination Act –

Mr. Silverstein: He has got a wound up witness, Your Honor.

Mr. Sales: I just want to hear his answer.

The Court: Go ahead, sir.

By Mr. Sales:

Q. Answer the question, sir.

A. The Fish and Wildlife Coordination Act which gave us this authority was passed in 1958, sir, and we did not have that on the books in 1957.

Q. But I take it, in 1960 when you renewed this permit?

A. Right.

Q. You, in your official capacity which you have held lo this many years, determined that they were not adverse ecological consequences of this permit.

A. Well, I can say this, that we must have determined that there were no overriding damages to the fish and wildlife resources, or we wouldn't have extended it in 1960.

Mr. Sales: Okay, sir.

The Court: What were the ecological considerations in this permit that concerned you in the department?

The Witness: Well, sir, the field has changed so rapidly in recent years. The Fish and Wildlife Coordination Act spoke only of fish and wildlife resources as such.

The Water Quality Act of 1965, I believe it was, added water quality considerations.

The Environmental Policy Act of 1969 has greatly expanded those considerations.

The Water Quality Act of 1970, Public Law 91224, has further added very strict requirements with respect to water quality.

The Court: Specifically in this case, which is a sand fill.

The Witness: Yes, sir.

The Court: It is a flat bay.

What consideration is there in this particular bay, as I recall this bay is a sand fill – there must have been thousands of them that I have seen over the years, so you must have something in mind or –

The Witness: We did, Your Honor, however –

The Court: What would be the possibility?

The Witness: We depend primarily on the agencies of both

the State and Federal Government who have expertise in that field to advise us on that.

The Court: Did they advise you on it?

The Witness: We sent notices, the public notices which were issued, to the State and Federal agencies involved for their comments.

The Court: And did they comment?

The Witness: I would have to review my files carefully, sir, but to the best of my recollection there were no comments except some from the state – there is one biological report from a state biologist in our files, there is one letter from a private organization, the Isaac Walter Reed, and perhaps one or two others who made some adverse comments.

The Court: At this time or subsequent?

The Witness: This was when the last extension was being considered.

The Court: Well, the Court is not terribly concerned about comments; I want the facts.

Mr. Sales: I would like to look at some more, Your Honor.

The Court: People comment on everything, including the color of your wife's dress; but I have to have the facts in this situation.

By Mr. Sales:

Q. Colonel, wasn't it –

The Court: To give it any serious consideration.

By Mr. Sales:

Q. Colonel, wasn't it –

The Witness: It's Mr. McKnight.

Mr. Sales: Excuse me, sir, I have been calling you Colonel all during these questions.

The Court: If you are going to call him something, Mr. Sales, call him General.

By Mr. Sales:

Q. Wasn't it your position in this matter, on December 27, 1963, that the Corps would issue this extension immediately, but for a request from the Trustee of the Internal Improvement

Fund that the extension be deferred pending receipt of the local fill permit?

A. Yes, sir.

Mr. Sikes: I am interposing an objection, Your Honor, and I may be premature, but the environmental and ecological considerations caught me by surprise, but I understood this gentleman to testify a moment ago that he was the engineer on the last permit and that he just assumed that perhaps some studies had been made.

I wonder at this time, and I do think the record is not clear as to whether that comes within his jurisdiction or whether he would have anything to do with it, biologically, ecologically, or environmentally.

The Court: When I was in Florida and was active as a lawyer in those days, and also on bills, and whatnot, particularly around Miami, I don't think we cared very much for any ecological situations as viewed by people or whether they were concerned or not.

Mr. Sikes: At that time, Your Honor, I don't think there was any law at all.

The Court: We just didn't concern ourselves.

Mr. Sikes: Well, my objection, and I may not be making myself clear, but I was wondering if this gentleman has the qualifications to testify to what was arrived at with regard to the permit or what percentages or what studies had been made.

It appears to me –

The Court: Oh, he certainly is since he was the man in charge of issuing the permit. I think that he is.

By Mr. Sales:

Q. So finally, Mr. McKnight –

A. I don't think I answered the last question.

Q. I think you did, sir. I think the Court heard the answer.

The question was, but for the Trustees requesting that you defer the extension of the permit in late 1963, you would have automatically extended it, and your answer was, yes.

A. I think we so stated in the letter. That is what it says here

(indicating).

The Court: And he said the same thing just a moment ago.

Mr. Sales: I have no further questions on cross examination, Your Honor.

You may inquire, sir.

The Court: Anyone have any further question?

Mr. Silverstein: No, sir.

Mr. Sikes: No, sir.

The Court: You may step down, sir.

(Witness excused)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DADE) ss.

I, *Arthur W. Bilotti,* Official Court Reporter, do hereby certify that the foregoing record, pages 1 through 15, contains a true and correct transcription of my stenographic notes of an excerpt taken from a Non-Jury Trial in the matter of Bankers Life and Casualty Co., an Illinois corporation, Plaintiff, versus The Village of North Palm Beach, Florida, et al, Defendants, before the Honorable Emett C. Choate, Federal Court, West Palm Beach, Florida, on March 17, 1971.

Dated At Miami, Florida, this 30th day of March, 1971.

Arthur W. Bilotti
Official Court Reporter

FLORIDA STATUTES, 1969

253.124 APPLICATION FOR FILLING LAND

(1) Any private person, firm or corporation desiring to construct islands or add to or extend lands or islands located in the unincorporated area of any county bordering on or in the navigable waters of the state, as defined in section 253.12, Florida Statutes, by pumping sand, rock or earth from such waters or by any other means shall make application in writing to the board of county commissioners of the county wherein such construction is desired for a permit authorizing such person, firm, or corporation to engage in such construction; provided, that where it is desired to construct islands or add to or extend existing lands or islands within the territory of any municipality such application for a construction or fill permit shall be made to the governing body of such municipality.

(2) In each instance the written application herein provided for shall be accompanied by a plan or drawing showing the proposed construction and the manner in which said construction will be accomplished and also the area from which any fill material is to be dredged if the proposed construction is intended to be created from dredged material. In the event the board of county commissioners or other authorized body shall find that such proposed extension or filling of land or such proposed dredging is not violative of any statute, zoning law, ordinance, or other restrictions which may be applicable thereto, that no harmful obstruction to or alteration of the natural flow of the navigable water, as defined in section 253.12, Florida Statutes, within such area will arise from the proposed construction, that no harmful or increased erosion, shoaling of channels or stagnant areas of water will be created thereby, and that no material injury or monetary damage to adjoining land will accrue therefrom, the same shall be granted to the applicant, subject to the approval of the board of trustees of the internal improvement trust fund, who shall have the power to approve, reject

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or issue; provided, however, that prior to the issuance of such permit, the board of county commissioners or other authorized body shall determine whether the granting of such permit and the construction to be done pursuant thereto would interfere with the conservation of fish, marine and wildlife or other natural resources to such an extent as to be contrary to the public interest and whether the destruction of oyster beds, clam beds, or maring productivity, including, but not limited to, destruction of natural marine habitats, grass flats suitable as nursery or feeding grounds for marine life, including established marine soils suitable for producing plant growth of a type useful as nursery or feeding grounds for marine life, will result therefrom to such an extent as to be contrary to the public interest. The board shall also consider any other factors affecting the public interests.

(3) No construction permit shall be issued or approved until the board of county commissioners or other authorized body shall have obtained at the expense of the applicant, a biological survey, an ecological study, and, where deemed necessary by the department of natural resources, a hydrographic survey of the area within which such construction and dredging is proposed, each by or under the supervision of the department of natural resources and shall have in hand the report and findings thereof. The report shall be read into the record and duly considered at the same meeting at which the board of county commissioners or other authorized body takes final action on the application for permit. Such surveys and studies may not be required if the proposed construction or dredging is wholly shoreward of a previously established bulkhead line which was fixed after consideration by the bulkhead authority of a biological survey and ecological study previously made by the department of natural resources or under its supervision in connection with the fixing of such line or if the proposed construction or dredging is wholly within lands or islands heretofore purchased from the Board of Trustees of the Internal Improvement Trust Fund under S 253.12 and in the consum-

mation of such sale the board had before it a biological survey made by or under the supervision of the department of natural resources.

(4) No construction permit shall be issued unless the proposed work is to be completed within three years next after the date of issuance, and each such permit shall expire three years after such date. Such time may be extended for additional periods of up to three years by the board for good cause, upon showing that all due efforts and diligence toward completion of said work have been made. The construction permit herein provided for may be revoked by the board for noncompliance with or for violation of its terms after notice of intention to do so has been furnished to the holder thereof and an opportunity for a hearing has been afforded. In the event a permit is refused, the applicant therefor may have the order refusing the permit reviewed upon filing a petition for the issuance of a writ of certiorari with the appropriate circuit court in the manner and within the time prescribed by the Florida appellate rules.

(5) Any person who violates any provision of this section is guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00), or imprisoned not exceeding six (6) months, or both, in the discretion of the court.

(6) The board shall have the authority to direct the abutting upland owner to remove any fill created in violation of this section, either on behalf of itself or on behalf of itself and the department of natural resources. In the event that the abutting upland owner does not remove said fill as directed, the board may remove it at its own expense and the costs thereof shall become a lien upon the property of said abutting upland owner; provided, that the board may, if it chooses, allow said fill to remain as state owned land, and may employ a surveyor to determine the boundary between such state land and that of the previous abutting upland owner. The amount of the cost of such survey shall become a lien upon the property of the previous abutting upland owner. Nothing herein shall be

construed to grant the board authority to direct an upland owner to adjust, alter or remove silt, fill or other solid material which has accumulated or been deposited seaward of his property through no action on his part.

(7((a) The board shall in no case issue an "after the fact" construction permit to any applicant authorizing construction regulated by this section subsequent to the time it has occurred, unless, upon consideration of a report by the department of natural resources, the board finds that the exercise of any other remedy or penalty available to it, either as provided by subsection (6) or otherwise by law or by rule or regulation adopted by the board would be more damaging to the environment or the marine resources sought to be protected by this chapter than would be the granting of such permit.

(b) The granting of such an "after the fact" construction permit shall not absolve any applicant from the provisions of subsection (5) of this section.

(8) Any riparian upland owner of land bordering on or in the navigable waters of the state who desires to repair, rebuild, replace, or reconstruct coastal structures in the nature of seawalls, revetments, retaining walls, bulkheads, or other similar protective structures installed upon his riparian upland, or who desires to restore such uplands after damage by avulsion or by artificially induced erosion, shall, before undertaking such project, obtain a permit for such work from the board of county commissioners or other authorized body or from the governing body of a municipality if the work proposed shall be within the territory of such municipality. Such a permit shall be subject to the approval of the board of trustees and shall not be valid without such approval. The riparian owner making application for such a permit may not be required to comply with section 253.122, Florida Statutes. A biological survey and ecological study may not be required if the proposed work lies at no greater distance than 25 feet into the waters where such work is proposed from the existing and established line of mean high water or existing coastal structure. A permit issued under

the provisions of this subsection shall not be construed to allow construction of coastal structures or restoration of lands that may be subject to the provisions of chapter 161, Florida Statutes.

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